LING KING MEE

v.

MOH CHU TECK

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[DIVORCE PETITION NO. 4 OF 1993]
10 JUNE 1993

FAMILY LAW: Petition for judicial separation - Application for ancillary relief - Preliminary objections - Application not served on respondent within time limited for service - Whether fatal - Application praying for custody of children - Whether petitioner precluded from seeking custody at this stage of the proceedings.

The petitioner applied for ancillary relief in respect of certain matters prayed for in the petition for judicial separation. Counsel for the respondent raised a number of preliminary objections. Counsel contended firstly that the petitioner had failed to serve a copy of the application on the respondent within the time limited for service and the question that arose was whether this breach was fatal enough to render the proceedings void or whether it was merely a curable irregularity.

Counsel for the respondent further contended that the petitioner's prayer for custody and maintenance of the children ought not to be entertained at this stage prior to the hearing of the petition for judicial separation on the grounds that the definition of ancillary relief in r. 2 of the Divorce & Matrimonial Proceedings Rules 1980 does not include custody.

Held:

[1] The petitioner's failure to serve the application within the time limited was merely an irregularity and one which was not calculated to mislead the respondent. The respondent's case had not been prejudiced as a result of the irregularity which was curable under O. 2 of the Rules of the High Court 1980.

[2] In any event, the respondent, by filing in affidavits disputing the merits of the application, had taken a fresh step in the proceedings with knowledge of the said irregularity. This had the effect of waiving the irregularity in question.

[3] On the basis of the words "at any time" in s. 88(1) of the Law Reform (Marriage & Divorce) Act 1976, there was at least an arguable case that the Court could deal with the petitioner's application for ancillary relief relating to the custody of the children prior to hearing the petition for judicial separation.

[4] On the issues of custody and maintenance, there was conflicting evidence as disclosed in the various affidavits filed by the disputing parties. That being the case it would not be proper and prudent to deal with them on the basis of such conflicting affidavit evidence without the benefit of examining and cross-examining the parties concerned. Such issues must conceivably be related or relevant to the degree of culpability of the parents in their relationship with each other.

[Application dismissed with no order as to costs].

Cases referred to:

Soo Lina v. Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent) [1992] 2 MLJ 870 ***(foll)***

Tan Sew Yok v. Ng Keng Huat [1989] 3 MLJ 381 ***(refd)***

Lee Yu Lan v. Lim Thain Chye [1984] 1 MLJ ***(refd)***

Yap Kim Swee v. Leong Hung Yin [1989] 3 MLJ 55 ***(refd)***

Marina Nahrulandran v. Appiah Nahulandran & Anor. [1976] 1 MLJ 137 ***(refd)***

Legislation referred to:

Divorce and Matrimonial Proceedings Rules 1980, rr. 2, 46(1)(2), 61(1)(2), 76(1)(3), 84, 102, Form 12, 13

Law Reform (Marriage & Divorce) Act 1976, s. 88(1)

Rules of the High Court 1980, O. 2

For the petitioner - Lin Quak Hong; M/s. Chong Brothers

For the respondent - Belinda Hii; M/s. Hii & Hii

JUDGMENT

Steve Shim Lip Kiong J:

In this case, the petitioner has applied by way of notice for ancillary relief (hereinafter referred as the Application) in respect of certain matters prayed for in the petition for judicial separation. At the outset and before hearing the merits of the Application, Miss Belinda Hii, Counsel for the respondent has raised a number of preliminary objections.

First she submits that under r. 61(1) of the Divorce and Matrimonial Proceedings Rules, 1980, under which this application is apparently made, the petitioner must serve a copy

of the Application on the respondent within 4 days after the filing thereof. Rule 61(1) stipulates:

> A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before a registrar shall, subject to r. 84, file a notice in Form 12 and within four days after doing so serve a copy on the other spouse.

She says that in this case the Application was filed on 6 January 1993 but it was only served on the respondent on 8 February 1993 well beyond the 4 days limit provided for in r. 61(1) above. She contends that as the Rule aforesaid has not been complied with, the Application should be set aside under r. 102(1). In response, Madam Lin, Counsel for the petitioner has submitted that as the petitioner has utilised Form 13 and not Form 12, the said Rule does not apply because it refers specifically to Form 12. In this connection, I should perhaps refer to *Soo Lina v. Ngu Chu Chiong (Chong Oi Khium Irene, co-respondent)* [1992] 2 MLJ 870 which has briefly dealt with this issue. The relevant passage in the judgment therein reads:

> I do not think that it is disputed that the petitioner has applied for ancillary relief in her petition. In that event if she intends to proceed with her application, r. 61(1) of the Rules requires her to file a notice in Form 12. However an examination for r. 61(1) and (2) of the Rules and Form 12 would seem to show that Form 12 therein should in fact be Form 13. Form 12 relates to r. 46(1) and (2) of the Rules and r. 61(2) relates to Form 11 or 13 in respect of an application for ancillary relief. I am therefore of the opinion that in a situation where a petitioner has also applied for ancillary relief in her petition and who intends to proceed with the application, shall file a notice in Form 13.

It would seem that the learned Judge in the above case was of the view that Form 12 referred to in r. 61(1) should be Form 13 instead and that in an application under the said rule, the correct form was Form 13 and not Form 12. I am quite prepared to accept the same view. In the circumstances, r. 61(1) is applicable in this case. There is therefore an obvious breach or non-compliance of the rule in question by the petitioner since the Application was served on the respondent's solicitors more than a month after it was filed with the Court registry.

Having stated that, what has to be considered next is the question of whether the breach or non-compliance aforesaid is fatal enough to render the proceedings void or is merely a curable irregularity. This has to be looked at in the light of several factors. Here, Madam Lin, for the petitioner, has explained that the delay was unavoidable because the relevant documents, after being submitted to the Senior Assistant Registrar, were not returned to them in time to be served on the respondent or his solicitors; that attempts were made to serve them but were unsuccessful and that only later when they received a letter dated 8 February 1993 from Messrs Hii & Hii, solicitors for the respondent, informing them of their willingness to accept service of the petition for judicial separation, were they (the petitioner's solicitors) able to serve the application on the respondent through his solicitors. Miss Hii, for the respondent, has responded by saying that the petitioner and or her solicitors should have drawn the Senior Assistant Registrar's attention to the relevant rules, etc. and as they had not done so, they have no one but themselves to blame. Such a proposition is of course quite commendable but I am not sure it provides a complete solution. In any event, I am quite prepared to accept the explanation of Madam Lin and hold that it is merely an irregularity and one which is not calculated to mislead the respondent nor do I think that the respondent's case has been prejudiced as a result. I am of the view that the irregularity is curable under O. 2 of the Rules of the High Court.

This brings me to the question of whether the respondent had taken any "fresh step" in the proceedings which had the effect of waiving the irregularity in question. Now, the record shows that the Application for ancillary relief was fixed for hearing on 13 February 1993 but on the said date, Miss Hii representing the respondent had applied for adjournment of 3 months as she was just engaged by the respondent and so needed time to examine the many allegations made by the petitioner and also that the respondent was in Bintulu at the time. Her request was granted and the case was adjourned to 17 May 1993. In the

meanwhile, the respondent, obviously upon advice from his solicitors, proceeded to file several affidavits, in answer. Madam Lin has contended that the respondent's solicitors' failure to raise the relevant objection at the appropriate time on 13 February 1993 and the subsequent filing of the affidavits by the respondent opposing the Application are to be construed as having taken a "fresh step" in the proceedings with knowledge of the irregularity in question. Miss Hii has countered by stating that the circumstances only provided her, as the solicitor for respondent, to object on 16 April 1993 at the hearing of this Application. But what are the circumstances? The record shows that Messrs Hii & Hii, solicitors of the respondent, received the Application on 8 February 1993 and the hearing date was fixed on 13 February 1993. As I have said earlier, Miss Hii had, on 13 February 1993, applied for adjournment for the reasons already stated. This is perhaps quite understandable because the time period was too short and she would have needed more time to study the Application as well as the relevant rules pertaining thereto. However, it is I think, reasonable to assume that by the time the respondent's affidavit in answer affirmed on 19 February 1993, was filed on 20 February 1993, Miss Hii, as solicitor for the respondent, would reasonable be expected to know of the irregularity in question and to take the appropriate steps to object or to apply to set aside the proceedings but she did not. Instead, she proceeded to file in the respondent's affidavits disputing the merits of the Application. This must clearly be regarded as talking a "fresh step" in the proceedings with knowledge of the said irregularity and with a view either to resist the Application on the merits or to obtain an advantage on costs. This has the effect of waiving the irregularity in question. Furthermore, I do not think that Miss Hii's request to have the Application set aside, arising as it does in the course of her submission relating to the preliminary objections, is made within a reasonable time for the reasons already discussed. I must therefore reject the request accordingly.

Now, Miss Hii has also contended that the petitioner's prayer for custody of the children in the Application ought not to be entertained by the Court at this stage prior to the hearing of the petition for judicial separation. She maintains that the definition of "ancillary relief" in r. 2 of the Divorce & Matrimonial Proceedings Rules, 1980, does not include custody and therefore the petitioner is precluded form seeking such a relief in this Application. Madam Lin, has however submitted that such a relief is provided for under s. 88(1) of the Law Reform (Marriage & Divorce) Act 1976, which stipulates thus:

> The court may **at any time** by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

She has laid emphasis on the words "at any time" underscored above. Attention has also been drawn to r. 76(1) which provides that application for custody of a child is to be made to a Judge and by r. 76(3), such application can be made either by summons or notice, as the case may be. In this connection, the case of *Tan Sew Yok v. Ng Keng Huat* [1989] 2 MLJ 381 seems relevant. In that case, there was a petition for divorce but before the hearing of the said petition, the petitioner applied for ancillary relief relating to custody of the infant of the marriage, maintenance for the child and an injunction against the respondent. This application was entertained by the High Court. It should be noted however that most of the other case authorities on the point seem to indicate that such application was dealt with by the Court either at the time when the petition for divorce or judicial separation was heard or after the *decree nisi* was granted; see *Lee Yu Lan v. Lim Thain Chye* [1984] 1 MLJ: *Yap Kim Swee v. Leong Hung Yin* [1989] 3 MLJ 55; *Marina Nahrulandran v. Appiah Nahulandran & Anor.* [1976] 1 MLJ 137. In any event, on the basis of the words "at any time" in s. 88(1) of the 1976 Act and the implication arising from *Tan Sew Yok supra,* there is at least an arguable case that this Court can deal with the petitioner's application for ancillary relief relating to custody of the children prior to hearing the petition for judicial separation. As regards the ancillary relief relating to maintenance prayed for by the petitioner in the Application, there is no difficulty because the term "ancillary relief", in its statutory definition, covers such a relief.

In view of the objections raised, Madam Lin, upon reconsideration and in the course of her submission, has indicated that she would only proceed with prayers (1), (2), (7) and (8) in the Application which relate to the issues of custody and maintenance of the children. She has decided to forgo the other prayers.

On the issues of custody and maintenance, there is conflicting evidence as disclosed in the various affidavits filed by the disputing parties. That being the case, I am not sure it would be proper and prudent to deal with them on the basis of such conflicting affidavit evidence without the benefit of examining and cross-examining the parties concerned and/or their witnesses if any. Such issues must conceivably be related or relevant to the degree of culpability of the parents in their relationship with each other. As Siti Norma Yaakob, J. has said in *Yap Kim Swee, supra,* that in considering the claim for maintenance, regard must be had to the degree of responsibility that led to the break down of the marriage. In my view, the same must apply to the issue of custody. Here, there are disputes as to the proper social environment for the children concerned; the financial standing of the disputing parties; their ability to act as role models for the children, etc. There may even be a need to obtain welfare reports on the parents and on the children. Here, the petitioner has alleged that the respondent had forcibly removed the children from their matrimonial home and brought them to his parent's house in Sibu and that she was denied access to the children. The respondent has of course denied this. Such and other related issues are better ventilated at the trial of the petition for judicial separation. It is perhaps interesting to note that there is nothing to indicate or suggest that the children, now in the care and custody of the respondent, are in such a desperate and intolerable situation that this Application has to be heard with urgency and despatch. Indeed, I do not detect in the affidavits of the petitioner that she is particularly worried or concerned about the present fate of her two children now in the custody of the respondent in Sibu as she is about the division or loss of certain properties alleged to be jointly owned by her and the respondent. The issues of custody and maintenance were never mentioned in her affidavit in support of this Application. Wherefor is the urgency?

Taking everything into consideration and for the reasons given, I do not think it prudent to entertain the Application at this time. I feel that the issues of custody and maintenance should properly be dealt with at the hearing of the petition for judicial separation. Accordingly, this Application is hereby dismissed. There will be no order as to cost.